A

PP

v.

KOK SEONG YOON

B

HIGH COURT MALAYA, JOHOR BAHRU
HUE SIEW KHENG JC
[CRIMINAL APPEAL NO: MT(5) 41-66-2008]
4 AUGUST 2009

C ***CRIMINAL LAW:*** *Film Censorship Act 2002 - Section 5(1)(a) - Possession of obscene DVDs - Appeal against acquittal and discharge - Prima facie case - Whether proved - Failure to carry out screen testing of DVDs - Whether DVDs proved to be obscene*

D This was an appeal against the magistrate's decision acquitting and discharging the respondent without calling for his defence. The charge against the respondent was for having in his possession 65 obscene DVDs on 22 April 2006, thereby committing an offence under s. 5(1)(a) of the Film Censorship Act 2002 and punishable under s. 5(2) of the same Act. The two main grounds that arose E were (i) the magistrate had erred in law and in fact in holding that the prosecution had not proved possession and (ii) the adverse inference pursuant to s. 114(g) of the Evidence Act 1950 should not have been invoked due to the failure to call two other persons who were also arrested together with the respondent on the night of F the raid.

Held (dismissing the appeal; affirming acquittal and discharge of respondent):

G **(1)** The charge preferred against the accused under s. 5(1) of the 2002 Act required proof of two main ingredients (i) the respondent at the material time was in possession of the 65 obscene films in the form of DVD and (ii) that the 65 films (DVDs) were obscene. In this case, there was the H uncontroverted evidence of SP1 and SP3 that the 65 DVDs were found under the counter and the respondent was found at the time of the raid, behind this counter. Knowledge could also be inferred from the fact that he attempted flight when SP1 identified himself as a public officer. Therefore, viewed in its I totality, the prosecution had proved the element of possession.

Further, there was no cause for the adverse inference to be invoked as it was trite that the calling of witnesses was at the discretion of the prosecution and the burden was on the prosecution throughout to prove its case. However, the second vital ingredient in this case ie that the 65 DVDs were obscene was not proved. There was no screen testing at all carried out during the trial *PP v. Chung Wan Li; PP v. Lee Swee Sing*. It was patently clear that the prosecution had failed to prove that the 65 DVDs were obscene and the magistrate should have so found. Hence, the prosecution had failed to prove a *prima facie* case against the respondent as per the charge. (paras 12, 14 & 15)

Case(s) referred to:
Mohamed Ibrahim v. PP [1962] 1 LNS 100 HC ***(refd)***
PP v. Chung Wan Li [2005] 8 CLJ 501 HC ***(refd)***
PP v. Lee Swee Sing [2009] 1 CLJ 320 HC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, s. 37(j)
Evidence Act 1950, s. 114(g)
Film Censorship Act 2002, ss. 5(1)(a), (2), 18(4)

For the appellant - Mohd Fazaly Ali Mohd Ghazali DPP
For the respondent - Azmi Ahmad Bakri; M/s Azmi Asram Shujaa & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Hue Siew Kheng JC:

Background

[1] This is an appeal against the decision of the learned magistrate made on 2 December 2008 wherein the respondent was acquitted and discharged without calling for his defence.

[2] The charge against the respondent was for having in his possession 65 obscene DVDs on 22 April 2006, thereby committing an offence under s. 5(1)(a) of the Film Censorship Act 2002 and punishable under s. 5(2) of the same Act.

[3] The petition of appeal discloses seven grounds but can be broadly categorized under two main grounds: that the learned magistrate had erred in law and in fact in holding that the prosecution had not proved possession and also the adverse inference pursuant to s. 114(g) of the Evidence Act 1950 should not have been invoked due to the failure to call two other persons who were also arrested together with the respondent on the night of the raid.

Brief Facts

[4] On 21 April 2006 at about a quarter to midnight, SP1 one ASP Nik Mathelan bin Nik Mohamed led a raid on the premises of Sky Video Trading at No. 6, Danga Bay, Lot 20704, Batu 4 1/2 Jalan Skudai, Johor Bahru. It was a crime prevention operation, targeted at pornography and prostitution.

[5] During the raid, three persons were arrested, including the respondent. The other two persons arrested were subsequently released as the police were of the view that they were customers at the said premises.

[6] A search of the premises revealed 65 pornographic DVDs which were found beneath the counter rack. The raiding party also found 120 DVDs and 19 VCDs without the "Sijil B", an offence under s. 18(4) of the Film Censorship Act 2002 for which the respondent was also charged.

[7] The respondent had pleaded guilty to the offence pursuant to the s. 18(4) charge and fined accordingly. However, in respect of the charge under s. 5(1) for being found in possession of the 65 DVDs alleged to be obscene, the respondent claimed trial. After full trial was conducted, the learned magistrate had acquitted and discharged him without calling for his defence.

The Charge

[8] The charge preferred against the respondent under s. 5(1) of the 2002 Act requires proof of two main ingredients ie, that:

(i) the respondent at the material time was in possession of the 65 obscene films in the form of DVD; and

(ii) that the 65 films (DVDs) are obscene.

[9] Having read the appeal record and the written submission of the appellant and having heard both parties, I am in agreement with the learned deputy public prosecutor that the element of possession has been proved through the prosecution witnesses SP1, 2 and 3 who were members of the raiding party.

[10] The 65 DVDs alleged to be obscene were found under the counter of the premises and at the material time of the raid, the respondent was alone in the premises manning the counter. He attempted to flee when SP1 identified himself as a police officer.

[11] The facts of this case are similar to *Mohamed Ibrahim v. PP* [1962] 1 LNS 100 HC wherein the appellant was found to be in possession of 65 copies of the book "Tropic of Cancer". The impugned books were found under the counter of his shop. The appellant in *Mohamed Ibrahim (supra)* was employed to manage the sale of books and though an attempt was made to absolve himself of knowledge as he could not read English, nevertheless the court held that the inference was irresistible that the 65 copies found in the shop for the purpose of being sold and that the appellant was the person in charge of selling of the books in the shop was in possession of them and in possession of them for purposes of sale. He also failed in his argument that knowledge was negated by his ignorance of the English language as the court held that he could have obtained the services of an English - speaking clerk in ordering the books.

[12] In this case, there was the uncontroverted evidence of SP1 and SP3 that the 65 DVDs were found under the counter and the respondent was found at the time of raid, behind this counter. Knowledge can also be inferred from the fact that he attempted flight when SP1 identified himself as a public officer. Therefore, viewed in its totality the prosecution had proved the element of possession.

[13] There is no cause for the adverse inference to be invoked as it is trite that the calling of witnesses is at the discretion of the prosecution and the burden is on the prosecution throughout to prove its case. I find no gap here, neither can it be said that there was any suppression of evidence.

[14] Therefore the learned magistrate had erred in holding that the element of possession was not proved and in invoking the adverse presumption.

Screen Testing For Obscenity

[15] However, I find that the second vital ingredient in this case, ie, that the 65 DVDs are obscene was not proved.

15.1. There is no evidence at all that the 65 DVDs were subject to a screen test (uji tayang) for the court to make a finding that the 65 DVDs are obscene.

15.2. SP1 merely testified that he was satisfied that the 65 DVDs were obscene by looking at the covers of the DVDs.

15.3. SP4, the I.O. of the case, said he had screen tested them at random in his office and found them to be obscene.

15.4. Although at one point of the proceedings the learned APP applied to reserve screen-testing of the DVDs, the learned defence counsel had responded that there was no need for screen-testing (p. 29 of Appeal Record). Unfortunately the court appeared to have agreed with learned defence counsel because nowhere in the notes of evidence does it appear that screen testing was done.

[16] In the case of *PP v. Chung Wan Li* [2005] 8 CLJ 501 HC, the learned High Court judge held that "the screening of each and everyone of the 18 VCD's is necessary to determine whether they were obscene films". In *Chung*'s case *(supra)*, the learned High Court judge did not approve of the random testing that was conducted during the trial.

[17] His Lordship Mohd. Zawawi Salleh, JC, concurred with the learned High Court judge in the case of *PP v. Lee Swee Sing* [2009] 1 CLJ 320 HC. His Lordship held in *Lee Swee Sing*'s case that there is no provision in the Film Censorship Act 2002 which allows for random testing. A comparison was drawn with the provision of s. 37(j) of the Dangerous Drugs Act 1952 which allowed for a 10% of the sample of the drugs to be tested.

[18] In this case, there was no screen testing at all carried out during the trial. How then can the court arrive at a finding that the 65 DVDs are obscene? It is patently clear that the prosecution had failed to prove that the 65 DVDs were obscene and the learned magistrate should have so found.

[19] For the reasons as adumbrated above the acquittal and discharge of the respondent is hereby affirmed as the prosecution had failed to prove a *prima facie* case against the respondent as per the charge.

[20] The appeal is accordingly dismissed.